A copy of the foregoing Petition for Writ of Certiorari was furnished Counsel for Respondent, Mr. Don W. Davis, by mailing same to him, postage prepaid, at his address at 800 Mercantile Bank Building, Dallas, Texas 75201.

Artie P. Stapleton

Artie P. Stapleton

APPENDIX

EXHIBIT A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(January 21, 1969)

Before ALDRICH,* GODBOLD and DYER,
Circuit Judges

GODBOLD, Circuit Judge: Sulphur Springs, Texas has a new post office and federal building, and Audley Moore & Son, as a subcontractor of Professional Constructors, helped build it. Moore, not having been paid, made proper demand on Professional on May 4, 1966 for payment for labor and materials furnished. Pay-

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*Of the First Circuit, sitting by designation.

ment was not made. This Miller Act case, 40 U.S.C.A. § 270a *et seq.*, against General Insurance Company of America as surety on Professional's payment bond was filed April 20, 1967.

The primary issue on appeal, which is dispositive of the case, is whether the claim was barred by the statute of limitations in the Act.[1] The trial judge overruled this defense and submitted the case to the jury, which returned a general verdict for appellee for the amount claimed.[2] The crux of the case is a determination of when the "last of the labor was performed or material was supplied."

It is undisputed that the only thing done by Moore after April 2, 1966 was to take final measurements and to make a final inspection pursuant to preparation of his final estimate or statement. This was done in the

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[1] 40 U.S.C.A. § 270b:

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing . . . , but no such suit shall be commenced after the expiration of one year after the day on which the last labor was performed or material was supplied by him. . . ."

[2] The trial judge charged the jury that before returning a verdict for either party they must determine the last day upon which labor or material was furnished. They were instructed that if the last day was prior to April 20 the verdict must be for the defendant; if after, they should find for the plaintiff. The judge also charged that even if they found the work was completed prior to April 20, they still could find for plaintiff if they also found that defendant was estopped from asserting the limitations defense. Since the jury returned a general verdict, we do not know which theory was the basis of the verdict.

latter part of April. All other activity had ceased and all materials had been supplied as of April 2.[3]

We conclude that the limitations period began to run on April 2, 1966. Appellee had one year from that date in which to file suit. Going on the premises to make final inspections and measurements for the purpose of preparing a final estimate or statement is insufficient

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[3]The undisputed evidence shows that the last of fifty-five payroll statements which Moore submitted to Professional was for the period of March 31, 1966 to April 2, 1966. The only work done after that date was characterized by Mr. Moore as follows:

"Q. Mr. Moore, what was the last work that you did on the project location itself?

A. That was final clean-up.

Q. And when was this done?

A. The last day of April and part of the first day of May. I wouldn't be positive of the two days, but it was in the latter part of April or the first of May.

Q. Did you do anything else on the project at that particular time?

A. Made all my final inspection and final measurements.

Q. Now, measurements of what?

A. Field measurements of work performed, such as so many lineal feet of curb and gutter, so many square feet of sidewalks, so many square feet of asphalt pavement.

* * *

Q. . . . what work, then, did you—did your firm do, sir, after, April 2, 1966?

A. Along the latter part of April my son and I went down and made all final inspections and final measurements on the project, computing it to make a — to make a final estimate.

Q. Final inspections — final measurements?

A. To see if there was any cleaning up or anything to do to the job.

Q. Did you do any cleaning up?

A. As well as I remember, there wasn't anything to do (Excerpts from Direct and Cross Examination.)

as a matter of law to constitute supplying labor within the meaning of 40 U.S.C.A. § 270b(b). Such activity involves no more "labor" than correcting defects in prior work. Yet correction of errors has been held insufficient to extend the time for filing suit. *See United States ex rel Barney Austin v. Western Electric Co.*, 337 F.2d 568 (9th Cir. 1964); *United States ex rel Circle-L-Electric Co. v. Hyde Construction Co.*, 255 F. Supp. 335 (N.D. Okla. 1966); *United States ex rel McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 185 F. Supp. 381 (M.D. Pa. 1960).

Appellee's theory would defeat the purpose of the 1959 amendment to section 270b(b), and restore some of the uncertainty the amendment was designed to remove.[4] Congress, by that amendment, attempted to set a specific, easily ascertainable date on which limitations begins to run. This court previously has said that the language of section 270b(b) is unambiguous and that the court must "give effect to the plain and obvious meaning of the statute without reading in or reading out." *General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 138 (5th Cir. 1967). We will not depart from that rule now.

Appellee also claimed at the trial, and submitted to the jury, that appellant was estopped from asserting limitations as a defense because: (one), by its letter dated March 28, 1967 appellant led the "plaintiff to reasonably rely that the defendant would take some

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[4]The amendment substituted "day on which the last of the labor was performed or material was supplied by him" for "date of final settlement of such contract."

type of remedial action in seeing that plaintiff's claim was investigated and at a further date would advise him of what course of action the defendant planned to follow in connection with this claim;" (two), that appellee's attorney negotiated with the attorney for appellant about the joinder of General Insurance in a state court action but those negotiations failed and this action was instituted forthwith; (three), that a statement made in a letter from appellant's attorney to General Insurance about when the limitations period expired caused appellee to rely on that date as the date to file suit.

All of these matters are insufficient as a matter of law to create estoppel, under the circumstances of this case. The letter of March 28, 1967 is set out in the margin.[5] It contained no representations or promises which might reasonably be expected to induce reliance by Moore or his attorneys to its detriment, nor was there any deception. *McWaters & Bartlett v. United States*, 272 F.2d 291 (10th Cir. 1959).

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[5]Dear Mr. Neal:

* * *

We acknowledge receipt of your letter dated March 21, 1967. This is the first notice we have had of such a claim.
At the present time we are asking Professional Constructors, Inc., to give us some information regarding this matter. As soon as we have heard from them we will contact you further.
Nothing in this letter should be deemed a waiver by the General Insurance Company of America of any of the terms and conditions of its bond.

Yours Very Truly,
L. L. Launsbury
Surety Claims

As for the other two bases of appellee's claim of estoppel, it need only be pointed out that the record shows conclusively that at the time of the alleged negotiations and the letter to General Insurance the attorney that appellee asserts was appellant's counsel was at that time counsel for Professional Constructors only. It was not until a later date that he undertook representation of General Insurance.

The district court is REVERSED with directions to enter judgment for appellant.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26241

GENERAL INSURANCE COMPANY OF AMERICA,
Appellant,

versus

UNITED STATES for the Use of
AUDLEY MOORE & SON,
Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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(April 4, 1969)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before ALDRICH,* GODBOLD and DYER, Circuit Judges.

PER CURIAM: In our original opinion we held that appellee's going on the premises to make final in-

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*Of the First Circuit, sitting by designation.

spections and to take measurements for the purpose of preparing his final estimate was insufficient to constitute supplying labor [in the prosecution of the work] within the meaning of 40 U.S.C.A. § 270b (b). The visit to the premises by appellant occurred in late April or early May. His activity on the premises had ceased for several weeks. His final payroll had been submitted for the period ending April 2.

Appellee advances the theory that the taking of measurements, and the subsequent preparation of the final estimate on May 4, constituted supplying labor in the prosecution of the work, by reason of a general provision of the contract that "on the 25th of each month * * * * subcontractor shall submit to the contractor an estimate of material on hand and work done." The gist of appellee's argument is that anything which he did in compliance with the terms of his contract constituted furnishing labor in the prosecution of the work, and until he discharged his every legal duty under the contract the statute of limitations did not begin to run.[1] Labor furnished in the prosecution of the work is not co-terminous with the outer limits of all duties provided by the contract.

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[1] Without attempting a definitive list we point out that the contract required appellee to furnish partial releases and partial waivers of liens from his materialmen and creditors as from time to time requested by the prime contractor, to furnish final releases and waivers of liens at the time of final payment, to pay unemployment and retirement taxes (state and federal), and to defend against claims arising from the agreement. The performance of any or all of these obligations can occur after appellee's work is complete and can require expenditure of time and effort by him.

Our original opinion referred, by way of analogy, to the principle that correction of errors does not extend the time for filing suit. In his petition for rehearing appellee directs us to the per curiam opinion in *Trinity Universal Ins. Co. v. Girdner*, 379 F.2d 317 (5th Cir. 1967), which states that the language in 40 U.S.C.A. § 270b (b) "is broad enough to include work performed upon the demand of the government to correct defects in the work as originally completed." *Id.* at 318. We consider *Trinity*. In that case the inspector refused to approve the original work unless defective parts were replaced. This is to be distinguished from the situation in which labor is supplied or material furnished to correct defects after the work has been completed.

Appellee's other assertions of error also are without merit.

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (FRAP 35; Local Fifth Circuit R. 12), the Petition for Partial Rehearing En Banc is DENIED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

EXHIBIT C

§ 270b. Same; rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor wthin ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy

in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. As amended Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279.

EXHIBIT D

Rule 50. Motion for a Directed Verdict

(b) Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

EXHIBIT E

Rule 59. New Trials; Amendment of Judgments.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

EXHIBIT F

FILED
Nov 22 1966
James R. Cooney, Clerk U. S. Dist. Court
By [illegible] Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA for the use of LARICH, INC., a corporation	:	
VS.	:	CIVIL ACTION NO. 1002
PROFESSIONAL CONSTRUCTORS, INC., a corporation and GENERAL INSURANCE COMPANY OF AMERICA, a corporation	:	

ANSWER OF DEFENDANTS PROFESSIONAL CONSTRUCTORS, INC. AND GENERAL INSURANCE COMPANY OF AMERICA

Defendants Professional Constructors, Inc. and General Insurance Company of America, for answer to the complaint, say:

1. Answering the first paragraph of the complaint, Defendants state that they have no knowledge relative to the truth or falsity of the allegations therein contained.

2. Answering the second paragraph of the complaint, Defendants admit the allegations therein contained.

3. Answering the third paragraph of the complaint, Defendants admit the allegations therein contained.

4. Answering the fourth paragraph of the complaint, Defendants deny that this court has jurisdiction of the cause of action asserted in the complaint on file herein.

5. Answering the fifth paragraph of the complaint, Defendants admit the allegations therein contained.

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY [signature] Deputy

6. Answering the sixth paragraph of the complaint, Defendants admit the allegations therein contained, except that they deny that said paragraph correctly alleges the condition of said payment bond.

7. Answering the seventh paragraph of the complaint, Defendants deny that Larich, Inc. and Professional Constructors, Inc. entered into a contract "to furnish labor and material and to prosecute the work provided for in the principal contract heretofore described ...".

8. Answering the eighth paragraph of the complaint, Defendants admit that Larich, Inc. furnished certain labor and material relative to the performance of the work provided for in the subcontract, but deny that all of the labor and materials which Larich, Inc. was obligated to furnish under subcontract were properly and/or timely furnished or done by Larich, Inc., and deny that all obligations of Larich, Inc. under said subcontract have been performed, and deny that they are indebted to Larich, Inc. relative to said subcontract in the sums alleged in said paragraph of such complaint, and deny that they have refused payment of sums properly owing under said subcontract to Larich, Inc.

9. For a first, separate and distinct defense, Defendants allege that a substantial portion of the labor and materials which Larich, Inc. was obligated to furnish upon such project under said subcontract was not properly and timely furnished or performed, as a consequence whereof Professional Constructors, Inc. has sustained substantial loss and expense, all of which should be charged to Larich, Inc.

10. For a second, separate and distinct defense, Defendants allege that the facts alleged in said complaint are insufficient to state a claim

upon which relief can be granted.

11. For a third, separate and distinct defense, Defendants allege that Larich, Inc. employed a subcontractor, to-wit, Hankins Electric Company and H & H Constructors, Inc. who did not properly finish the work and labor which they were obliged to perform under such subcontract, and that consequently Defendant Professional Constructors, Inc. was forced to take over that portion of the work done by Larich, Inc.'s said subcontractor, and obliged to finish same, at great additional costs, all of which should be back charged to Larich, Inc. and deducted from any sum recovered by them in this suit.

12. For a fourth, separate and distinct defense, Defendants would show that the aforesaid subcontractor of Larich, Inc., to-wit Hankins Electric or H & H Constructors, Inc., wrongfully instituted action in the District Court in Sulphur Springs, Texas, which Professional Constructors, Inc. was obliged to defend, at great costs to itself, all of which should be back charged to Larich, Inc. and deducted from any sums ultimately recovered by it herein.

13. For a fifth, separate and distinct defense, Defendants would show that there are certain well defined and accepted back charges under the subcontract which Larich, Inc. has sued upon herein, many of which have previously been accepted by Larich, Inc., but which Larich, Inc. now wrongfully fails to recognize, that there are other back charges properly attributable to Larich, Inc., all of which should be charged to and deducted from any sums which Professional Constructors, Inc. may lawfully owe Larich, Inc.

14. For a sixth, separate and distinct defense, Defendants allege that the subcontract agreement provides in paragraph 27 thereof that the "prevailing party shall be entitled to have in the judgment an award of reasonable attorneys' fees incurred in connection with said action; that under the terms of paragraph 27 Defendants are entitled to an award of reasonable attorneys' fees, which they allege to be the sum of $2,500.00; that such sum should be deducted from any sums found to be owing herein to Larich, Inc. on said contract.

WHEREFORE, Defendants pray judgment that Plaintiff's complaint be dismissed with costs to Defendants; in the alternative that as to any monies which are lawfully due and payable to Plaintiff, upon their determination an attorneys' fee in behalf of Defendants be awarded and deducted from the monies so owing, with costs to Plaintiff.

DATED: November 21, 1966.

IRION, CAIN, COCKE AND MAGEE

BY Don W. Davis
Don W. Davis
830 Mercantile Bank Building
Dallas, Texas 75201 RI 7 3567
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of November, 1966, a true copy of the above and foregoing answer of Defendants Professional Constructors, Inc. and General Insurance Company of America was served upon Plaintiff Larich, Inc. by depositing same in the United States mail, postage prepaid, properly addressed to Hayes McClerkin, 320 State National Bank Building, Texarkana, Arkansas 75501, attorney of record for Plaintiff.

Don W. Davis
Don W. Davis

EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA for the use of LARICH, INC., a corporation	:	
VS,	:	CIVIL ACTION NO. 1002
PROFESSIONAL CONSTRUCTORS, INC., a corporation and GENERAL INSURANCE COMPANY OF AMERICA, a corporation	:	

DEMAND FOR TRIAL BY JURY

TO: Hayes McClerkin, Attorney for Plaintiff
Address: 320 State National Bank Building
Texarkana, Arkansas

Defendants Professional Constructors, Inc. and General Insurance Company of America hereby demand trial by jury of all issues in the above entitled action:

Dated December 1, 1966.

IRION, CAIN, COCKE AND MAGEE

Don W. Davis

Don W. Davis, Attorney for Defendants
Address: 830 Mercantile Bank Building
Dallas, Texas 75201

FILED
Dec 14 1966
U. S. Court
DEPUTY

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY Myra Barton
Deputy

EXHIBIT H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

FILED
— M. Feb 9 1967
James R. Cooney, Clerk, U. S. Court
By Mary O Prater
DEPUTY

UNITED STATES OF AMERICA
for the use of LARICH, INC.,
a corporation

VS.

PROFESSIONAL CONSTRUCTORS,
INC., a corporation and GENERAL
INSURANCE COMPANY OF AMERICA,
a corporation

CIVIL ACTION NO. 1002

JOINT MOTION FOR CONTINUANCE

NOW COMES, all the parties in the above styled and numbered cause and move the Court to enter an Order continuing the above case until the October Term of said Court for the reason that this suit involves a very complicated series of events and financial transactions, for the full discovery of which council have not yet had sufficient time to develop; the parties hereto would ask this Honorable Court that this cause be continued for the additional reason that Mr. Hayes McClerkin, lead council for the Plaintiffs, is a member of the Arkansas Legislature which is now and will be in session until the middle of March, 1967.

DATED, This _____ day of February, 1967.

SMITH, SANDERSON, STROUD & McCLERKIN
State First National Bank Building
Texarkana, Arkansas
Attorneys for Larich, Inc.

By: Hayes McClerkin
Hayes McClerkin

WHEELER, WATKINS, HUBBARD, PATTON & PEEK
Texarkana National Bank Building
Texarkana, Texas
Attorneys for Larich, Inc.

By: Jerry A. Rochelle
Jerry A. Rochelle

IRION, CAIN, COCKE & MAGEE
830 Mercantile Bank Building
Dallas, Texas
Attorneys for Professional Constructors, Inc.

By: Don W. Davis
Don W. Davis

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY Myra Barton
Deputy

EXHIBIT I

FILED
AUG 29 1967
M.
James R. Cooney, Clerk, U. S. Court
By Augustine Starnes
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

UNITED STATES OF AMERICA FOR THE USE OF LARICH, INC., a corporation	0	Civil Action No. 1002
VS.	0	MOTION TO DISMISS
PROFESSIONAL CONSTRUCTORS, INC., a corporation, and GENERAL INSURANCE COMPANY OF AMERICA, a corporation	0	

Larich, Inc., a corporation, alleges that all matters in controversy in the above entitled and numbered cause have been fully, finally and completely settled and adjusted, and consequently said cause should be dismissed, with prejudice, at cost of the defendant, Professional Constructors, Inc. whose counsel joins in this motion to evidence its agreement to said disposition.

Dated: August 28, 1967

SMITH, SANDERSON, STROUD & McCLERKIN

By: [signature]

Attorneys for Plaintiff, Larich, Inc.
320 State National Bank Building
Texarkana, Arkansas

IRION, CAIN, COCKE, MAGEE AND DAVIS

By: [signature]

Attorneys for Professional Constructors, Inc., and General Insurance Company of America
830 Mercantile Bank Building
Dallas, Texas

A TRUE COPY I CERTIFY
JAMES R. COONEY, CLERK
U. S. DISTRICT COURT
EASTERN DISTRICT, TEXAS
BY [signature]
Deputy

D-1